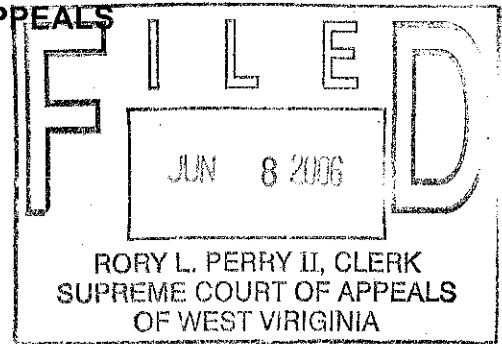


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DIANNA MAY SAVILLA, Administratrix
of the Estate of **LINDA SUE GOOD KANNAIRD**,
Deceased,

Petitioner Below and
Appellant herein,



v.

No. 33053

SPEEDWAY SUPERAMERICA LLC,
d/b/a **RICH OIL COMPANY**, a Delaware
Corporation,

Respondent Below and
Appellee herein

AND

EUGENIA MOSCHGAT,

Intervenor.

**INTERVENOR'S BRIEF IN OPPOSITION
TO DIANNA MAE SAVILLA'S APPEAL**

J. Michael Ranson
Cynthia M. Ranson
Ranson Law Offices
1562 Kanawha Blvd., East
Post Office Box 3589
Charleston, West Virginia 25336-3589
(304)345-1990

Table of Authorities:

Bell v. Vecellio & Grogan Inc., 197 WV 138, 475 S.E.2d 138, (1996).....	24
Mandolidis v. Elkins Industries, Inc., 161 W. Va. 695, 246 S.E.2d 907,911-12 (1978).....	23
Zelenka v. City of Weirton, 208 W. Va. 243, 539 S.E.2d 750 (2000).....	24

State Statutes

West Virginia Code 23-4-2.....	13, 21, 23, 24, 26, 27
West Virginia Code 23-4-10.....	26

**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA
Charleston**

DIANNA MAY SAVILLA, Administratrix
of the Estate of **LINDA SUE GOOD KANNAIRD**,
Deceased,

Petitioner,

v.

No. 33053

SPEEDWAY SUPERAMERICA LLC,
d/b/a RICH OIL COMPANY, a Delaware
Corporation,

Respondent.

**INTERVENOR'S BRIEF IN OPPOSITION
TO DIANNA MAE SAVILLA'S APPEAL**

Comes now the Intervenor herein, Eugenia Moschgat, and files her response to the petitioner's appeal and prays that this Honorable Court affirm the Order of the lower Court. The appeal is from the final order of the Circuit Court of Kanawha County, West Virginia, the Honorable Paul Zakaib, Judge, entered on April 8, 2005, which granted the Motion to Dismiss of Speedway SuperAmerica LLC, d/b/a Rich Oil. In addition, the circuit court's order denied Petitioner's Motion to Certify Questions to this Court.

INTRODUCTION

The Petitioner's utter failure to recite any support for her position in the case law has led to a desperate attempt to divert this Court's attention from the only matter at issue – i.e. who is the proper plaintiff in the suit brought pursuant to West Virginia Code 23-4-2, and who is the proper person to recover in such a suit.

Clearly, the outright hostility of the Petitioner and her counsel towards Eugenia Moschgat, the decedent's only child and sole heir, is an obvious irreconcilable conflict. Ms. Moschgat has proclaimed time and again that she did not retain Ms. Workman to represent her interests in this matter and has completely disavowed any potential suggestion that Ms. Workman is her representative.

Finally, it is abundantly clear that Ms. Moschgat is the only beneficiary under any interpretation of the relevant statute. The Petitioner and her counsel spend an extraordinary amount of time reciting "facts" which are totally irrelevant to the outcome of this appeal. The only operative facts for purposes of the appeal are that Linda Kannaird, who was an employee of Speedway SuperAmerica died in the course of her employment and at the time of her death, there was no widower or dependent and Ms. Moschgat was Ms. Kannaird only child.

Turing to the merits of the appeal, Eugenia Moschgat will provide the Court with an accurate dissertation of the facts and then address the Petitioner's arguments.

**STATEMENT OF PERTINENT FACTS
PRIOR TO LINDA KANNAIRD'S DEATH**

On February 18, 2000, Linda Kannaird, along with several other individuals, was killed when she drowned as a result of being thrown out of a watercraft piloted by the City of Charleston Fire Department in rising flood waters. At the time of her death, Linda Kannaird was employed as a clerk with Speedway SuperAmerica and was asked to come to work, bring her truck and assist in removing inventory from a convenient store near Sissonville which was being threatened by rising water.

At the time of her death Linda Kannaird had one sole heir, her only child, Eugenia Moschgat who was born on November 7, 1965. Eugenia was the only child resulting from the marriage of Linda Kannaird and Eugene Summers. Eugenia was only two years old when her parents separated. Upon her parent's separation, Eugene Summers obtained custody of his two year old daughter and along with his daughter's paternal grandmother undertook to raise the little two year old girl. For the next ten (10) years, Eugene Summer retained physical custody of his daughter with Eugenia being visited by her mother, Linda Kannaird every other weekend and for extended periods of time during the summer. When Eugenia was 12 years old, a final custody hearing was held at which time, full custody of Eugenia was granted to Eugene Summers. Thereafter, Linda Kannaird did not visit with Eugenia much claiming that because Mr. Summers had remarried, Eugenia now had a "new mother." For the next several years, Eugenia, to the extent a 12 year old child could, attempted to keep in touch with her mother by telephone and by sending her greeting cards, but Eugenia eventually lost contact with her mother as her mother moved from place to place.

Throughout her young life, Eugenia continued to live in Sissonville and resided with her father and paternal grandmother on the same stretch of road upon which she had always lived. Eugenia had constant contact with some of her mother's siblings, including her Uncle Roger Good and her Aunt Donna Cobb. According to Roger Good, he would see Eugenia getting on and off the school bus and walking up the road on a regular basis. They would always wave to one another and exchange greetings. Eugenia attended elementary, junior high and high school in Sissonville with her first cousin, Donna Cobb's daughter, and would see her Aunt Donna from time to time at school activities and events. She always cajoled with her Aunt Donna and her cousins. Eugenia always felt as though she had a good relationship with her Uncle Roger and her Aunt Donna. At no time did her Aunt Donna or her Uncle Roger attempt to reunite Eugenia with her mother. The only evidence of actual contact between Linda Kannaird and Eugenia during her school years occurred when Eugenia was a Senior in high school. According to Eugenia, after a nearly a ten (10) year absence, her mother unexpectedly appeared at Sissonville High and introduced Eugenia to her "new step father" – Jim Kannaird. Eugenia was shocked and dismayed at her mother's timing and unannounced appearance at school. Eugenia asked her mother to leave the school.

Upon graduation from Sissonville High School, Eugenia immediately joined the Army. Eugenia spent a total of seven and one half years in the military with six (6) years of those years being served overseas in Germany. Her service to this Country also included active participation in Desert Storm where she served in Saudi Arabia and Iraq. While enlisted in the military, Eugenia Moschgat married and had one child, Bernie. After she was Honorably Discharged from the military, Eugenia settled in

Fayetteville, North Carolina with her husband and young son. She was residing in North Carolina when she received the dreadful news that her mother had perished in a boating accident.

On February 20, 2000, when Eugenia Moschgat received the telephone call from her father advising her that her mother had died, she felt "if someone had not been standing behind me, I think I would have hit the floor. It blew me away." Within two hours of learning of her mother's death, Eugenia was on a plane to West Virginia. Eugenia recalled that she cried the whole way on the plane and prayed a lot. She immediately assisted in making her mother's funeral arrangements including agreeing to be responsible for all of her funeral bills. Despite the fact that Ms. Kannaird had nine (9) brothers and sisters in the Sissonville area none agreed or even offered to help with the funeral expenses. However, Eugenia admittedly did not ask for any help as she believed that it was her duty to take care of the arrangements and to be financially responsible for her mother.

The unequivocal evidence in this case is that when Eugenia arrived in West Virginia to assist with her mother's funeral tend to her personal affairs, she was greeted with open arms. She was immediately invited to her Aunt Donna's home and was greeted with hugs at the funeral home by all of her and her mother's family, including all of the brothers and sisters of Linda Kannaird. There is a complete absence of evidence of any hostility being exhibited by Eugenia toward her relatives or by any of her mother's siblings toward her.

The only negativity that arose between Eugenia and three of her Aunts occurred when a cry for help was placed to Eugenia by Danny Fouts' daughters. At the time of

her death, Linda Kannaird was living with Danny Fouts. Mr. Fouts also perished in the flood waters along with Linda Kannaird. Shortly after Linda Kannaird's death, a number of Linda Kannaird's sisters went to Danny Fouts' house and began to remove things from Mr. Fouts' house. Danny Fouts' daughters were unable to stop them and sought assistance from Eugenia. In response to the cries for help, Eugenia simply went to the Fouts' house and advised her Aunts that she would go through and inventory her mother's personal items and then based on what was actually determined to be Linda Kannaird's, a distribution would be made to all who wished to have something of Linda Kannaird's. Eugenia made it perfectly clear that she did not wish to deprive her aunts and uncles of anything but merely wanted to retain family photographs of her and her mother, the family bible and an antique night table. The Aunts were not satisfied with that representation and undertook from that point on to attack and undermine Eugenia and her efforts.

The paramount fact that has risen to the top of this civil action is that Eugenia Moschgat yearned for a meaningful relationship with her mother and based upon the testimony developed in this matter from all of the Linda Kannaird's siblings, Linda wanted a relationship with her daughter. Unfortunately Ms. Kannaird's untimely death kept that event from ever occurring.

STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY FOLLOWING LINDA KANNAIRD'S DEATH

On February 27, 2000, Ms. Moschgat met with three of her aunts, Denise Harrison, Donna Cobb, and Diana Mae Savilla, to discuss matters regarding her

mother's death. After discussing the manner in which her mother died it was agreed by everyone that an attorney should be employed to explore a wrongful death suit.

On February 28, 2000, Eugenia Moschgat, as her mother's one and only descendant, applied to be Administratrix of her deceased mother's estate, and the Kanawha County Commission duly appointed her as such. That same day, Ms. Moschgat, as Administratrix of her deceased mother's estate, retained the legal services of Ranson Law Offices to institute a wrongful death suit on behalf of Linda Kannaird's estate.

On March 11, 2000, the some of the brothers and sisters apparently retained Margaret Workman as their counsel. On March 23, 2000, counsel for Ms. Moschgat was advised that the Goods had retained counsel to represent their interests. The notice of said representation was given per a telephone conversation between Margaret Workman and Cynthia Ranson, counsel for Ms. Moschgat. During the course of said telephone conversation, Margaret Workman advised Ms. Ranson that her clients were not agreeable to Eugenia Moschgat serving as Administratrix and demanded that one of the Goods be permitted to serve as co-administrator and that she, Margaret Workman, be permitted to serve as co-counsel. Cynthia Ranson, on behalf of Ms. Moschgat, declined such an arrangement with the Goods.

On March 23, 2000, the Goods filed a Petition to Remove Administratrix in the Estate of Linda Kannaird in the County Commission of Kanawha County. On March 24, 2000, after receiving such Petition, Cynthia Ranson, counsel for Ms. Moschgat, wrote to Margaret Workman, counsel for the Goods, warning Ms. Workman that such Petition and any response thereto would become public record and that the potential defendants

would have access to all information and allegations contained therein. Ms. Ranson further suggested that the Goods withdraw their Petition and assured Ms. Workman that Ms. Moschgat would keep the Goods, as potential beneficiaries of the wrongful death action, fully apprized of the status of the investigation and the potential wrongful death litigation. Finally, Ms. Ranson proposed to Ms. Workman that a better resolution to any apparent conflict between the Goods and Ms. Moschgat would be for the Goods to withdraw their Petition instead of waging a public battle which would only feed information to the defendants in the wrongful death action. Furthermore, J. Michael Ranson, also counsel for Ms. Moschgat, advised Ms. Workman on March 30, 2000 via letter that the Goods and Ms. Moschgat should present a united force against the defendants by presenting to the jury stories of each individual's grief as a result of the loss of Linda Kannaird rather than attacking each other in front of all the defendants in the wrongful death action.

On April 11, 2000 a wrongful death action was filed by the Ms. Moschgat on behalf of Linda Kannaird's estate. The suit was ultimately consolidated with several other wrongful death actions as **Huffman v. Speedway SuperAmerica, et al.**, 00-C-974 and assigned to the Honorable Paul Zakaib, Jr.

On June 28, 2000, a Petition for Temporary Injunctive Relief, a Motion to Intervene with a Petition for Declaratory Relief attached thereto, along with a "Notice" were purportedly filed with the Circuit Court of Kanawha County, West Virginia. **(Judge Zakaib noted in a July 5, 2000 hearing that the Petition for Temporary Injunctive Relief was not in the Court file.)** The "Notice" attached thereto set forth that a hearing on the attached Motion to Intervene and Petition for Declaratory Relief would be held on

the 31st day of July, 2000 at 2:00 p.m. and that a hearing on the attached Petition for Temporary Injunctive Relief would be heard on July 5, 2000. However, The Petition for Temporary Injunctive Relief and the Motion to intervene with the Petition for Declaratory Relief attached thereto were never served upon Eugenia Moschgat, personally or otherwise but was instead slid under the door of Ranson Law Offices. In fact, to date, the Goods have not filed a separate action for declaratory relief.

Despite such failure of filing and service, on July 5, 2000, the Court entertained the Goods' request for temporary injunctive relief and granted a stay of the wrongful death proceedings. Counsel for Ms. Moschgat appeared at the July 5, 2000 hearing and objected to the court hearing any of the Goods complaints because the complaints should have been properly brought before the County Commission and such complaints were improperly before the court. After hearing the Goods' arguments in support of a stay of proceedings and Ms. Moschgat's arguments opposing the stay, the court ruled as follows:

"If I do grant the motion for a stay until the 31st, that would resolve the issues as it relates to whether or not you should be entitled to intervene. If I rule that you're entitled to intervene, then you-all can go ahead take the depositions and also set the motions, dispositive motions for argument and also schedule a hearing before Mr. Keener on your motion to disqualify the Administratrix. I don't see where any real harm is going to occur to anybody, here by granting the motion to stay for, at least, three weeks. I'm going to grant a motion for a stay. Proceed as such."

Subsequently, at a July 31, 2000 hearing on the issue of declaratory relief, Judge Zakaib heard evidence from several of the Goods, which tended to show only that the Ms. Moschgat and Ms. Kannaird did not have a relationship and that the Goods and Ms.

Kannaird had a relationship. The Goods also put on evidence that Ms. Kannaird did not have money for food and medical treatment and that Ms. Kannaird had to go to strangers for gifts of money even though her brothers and sisters lived in the same county.

On August 18, 2000 Judge Zakaib issued an Order granting the Goods' Motion to Intervene and deeming the Goods' service of the Petition of Declaratory Judgment upon Ranson Law Offices proper. The court also granted the Goods' motion pursuant to Rule 8(d), thereby deeming all factual averments in the Goods' Petition for Declaratory Relief to be true. As a result of such ruling, the Court essentially made the Goods parties to the wrongful death action, allowing them to participate in discovery in the case.

Given the fact that the Court granted the Goods' Motion to Intervene on August 18, 2000, Ms. Moschgat filed an answer to the Goods' Petition for Declaratory Relief on August 30, 2000. At a hearing on October 4, 2000, however, the Court struck the factual allegations and responses contained in Ms. Moschgat's answer, ruling that the answer was not timely filed. The Court subsequently allowed Ms. Moschgat to vouch the record with the evidence she would have put on if the Court had not struck such answer. On January 8, 2001, the court granted the Goods' Petition for Declaratory Relief, removed Ms. Moschgat from her office as Administratrix of her mother's estate, and replaced Ms. Moschgat with Dianna Mae Savilla.

As a result of Ms. Moschgat being removed as Administratrix, the only change in the litigation was that the new Administratrix terminated Ranson Law Offices and replaced them with Margaret Workman. However, unlike prior counsel, Margaret Workman has announced on several occasions that she was not representing Eugenia

Moschgat. Furthermore, since being designated as new counsel in 2001, Ms. Workman has been unable to get the case to trial and/or settled. During this same time, all of the other parties who were either injured or had loved ones die in the tragic flood have resolved their claims.

Due to the clarity of the law, Ms. Moschgat, in July 2003, Eugenia Moschgat settled her individual claim with Speedway SuperAmerica as the only person who could recover in an action pursuant to West Virginia Code § 23-4-2. The settlement is confidential and is contingent upon the entire case against Speedway SuperAmerica being dismissed. On September 9, 2005 the Circuit Court of Kanawha County dismissed the complaint of Linda Kannaird against Speedway SuperAmerica and the Petitioner filed this appeal.

**ADDITIONAL FACTS AS THEY PERTAIN TO THE POLICY ARGUMENT
OF THE PETITIONER AND THE PRE-DEATH RELATIONSHIP OF THE
DECEDENT'S SIBLINGS WITH THE DECEDENT**

The Appellant and her counsel spend an extraordinary amount of time reciting "facts" which are totally irrelevant to the outcome of this appeal. The only operative facts for purposes of the appeal are that Linda Kannaird, who was an employee of Speedway SuperAmerica, died in the course of her employment and at the time of her death, there was no widower or dependent and Ms. Moschgat was Ms. Kannaird's only child. The Petitioner's utter failure to recite any support for her position in the case law has led to a desperate attempt to divert this Court's attention from the simple truth; Eugenia Moschgat is the only beneficiary under the statute. Since no dependents were

identified in the Complaint or in discovery, the employee is deceased and there is no widower only the daughter is entitled to take.

It would be an incredible injustice for this Court to deny the only child of Linda Kannaird an opportunity to address and rectify her mother's death. The Appellant repeatedly misrepresents the true and actual relationship between Eugenia and her mother as well as the "loss of those who loved and were actually in a relationship with Linda Kannaird". There is absolutely a complete absence of evidence that Ms. Moschgat rejected her mother for twenty years. The simple fact is that Eugenia was the victim of a domestic battle between Linda Kannaird and Eugene Summers that began when Eugenia was just two (2) years old. It is uncontroverted that when her parents separated, custody of Eugenia was granted to her father. From the time Eugenia was 2 years old until she was 12 years of age, she resided with her father and her paternal grandmother. Over the course of those ten (10) years, Eugenia enjoyed a relationship with her mother who visited with her every other weekend and extended period of times during the summer. Then, when Eugenia turned twelve (12) years old, a final custody hearing resulted in full custody being given to Eugene Summers. Thereafter, Eugenia recalls that her mother became more distant and that although she made continuing efforts to stay in touch via telephone and greeting cards, she eventually lost contact with her mother.

Thereafter, in 1987, Eugenia graduated from high school, and immediately went into the military where she served over seven and on half years. Eugenia spent six (6) years of her service in Germany. Upon her return to the United States, Eugenia was stationed at Fort Drum, New York where she resided until she was Honorably

Discharged. Upon her departure from the military, Eugenia settled in North Carolina with her husband and young son.

Meanwhile, Linda Kannaird was living life in West Virginia. According to the testimony from the various siblings of Linda Kannaird, the "family" was quite close up until 1987, when their mother died. Their father had passed a few years earlier. Prior to 1987, the family would get together on Sundays for family cookouts. However, after the Good parents died and according to **Earl Good**, "things just broke." (See Deposition Transcript at Page 26) The family home place was torn down and the brothers and sisters just seemed to drift apart. Earl Good could not recall specifically the last time he saw Linda prior to her death but recalled stopping in for gas and seeing her occasionally. During the eight years prior to her death, Earl Good had only seen Danny Fout once or twice. Earl Good admitted that he was not financially dependent on Linda Kannaird.

A simple review of the history of the Good family reveals that after their parents died, they simply lived their lives and went about their daily business and would go as more than a year without speaking to or seeing one another. For example, **Vernon Good** stated that the last time that he recalled Linda being at his house before her death was in the "late 80's". (See Deposition at Page 32) Linda died in the year 2000 – a ten (10) to fifteen (15) year absence. When asked when was the last time you were at Linda's house before her death, Vernon Good's response was "it's been along time". (See Deposition at Page 32) When asked if he "knew Danny Fout" – Linda Kannaird's companion of 8 years, Vernon Good's response was "personally, no." (See Deposition at Page 32) When asked if he had ever been to Linda and Danny's home, Vernon

Good responded "No". (See Deposition at Page 33) There is no evidence that Earl Good was financially dependent on Linda Kannaird.

John Good's relationship with Linda Kannaird was just as distant as Vernon's. For example, when asked "when the last time before her death that you had your sister over for dinner to your house?" John Good's response was "it had been a while". When further inquiry was made, John Good admitted that it had been "more than a year". (See Deposition at Page 44) John Good was not financially dependent on Linda Kannaird.

Joseph Good's relationship with Linda Kannaird was likewise distant. Other than occasionally stopping for gas at the SuperAmerica and seeing his sister by happenstance, Joseph Good could not recall the last time he saw his sister. (See Deposition Transcript at Page 38) Joseph Good had never been on vacation with Linda Kannaird and had never been to her home that she shared with Danny Fout. Additionally, Joseph Good was not financially dependent on Linda Kannaird.

Roger Good's relationship with Linda Kannaird was very similar to his brothers. Before her death, the last time Roger saw Linda was when he stopped at the SuperAmerica and bought gas and cigarettes. When asked if he talked to her, Roger responded "when she was there, you know, I always did. Sometimes she would be different shifts, you know, and she wasn't there all the time I stopped." (See Deposition at Page 26) When asked if he knew Danny Fout, Roger Good's response was "that was her boyfriend, I understand, you know, I've met him two or three times and understand it was her boyfriend." (See Deposition at Page 29) Danny Fout and Linda were together for 8 years prior to her death. Roger Good was not financially dependent on Linda Kannaird.

Michael Good's relationship with Linda Kannaird was strained at best. Michael is a self professed minister and did not approve of Linda Kannaird's life style. He objected to her "living with Danny Fout". While he claimed that he "loved her as a sister . . . but as a minister and a child of God, I know the lifestyle that Linda was living. She wasn't married to Danny. Fout" Michael stated that he did not approve of her lifestyle and he thought that "that's part of the reason Linda didn't visit me like she did in the past." He opined that "if you're living with someone you're not going to knock on a minister's door very often". He stated that prior to her death; and after Linda and Jim Kannaird divorced he would "not see a whole lot of her. I mean, stop in, get gas, and say hi." (See Deposition at Page 31) Linda and Jim Kannaird divorced nearly 10 years before her death. Additionally, Michael Good professed that Linda loved her daughter and that Linda never said that she did not want Eugenia to have anything after she died." (See Deposition at Pages 36 and 53) Michael Good was not financially dependent on Linda Kannaird.

James Good had basically the same relationship with Linda Kannaird as his brothers. Prior to her death, he had not "seen her for a good while; although he did recall seeing her one month before at the gas station. (See Deposition at Pages 12 -18) James had never met Danny Fout and had not been to the house Linda shared with Danny for 8 years (See Deposition at Page 19) Furthermore, the last time James recalled the family getting together was in 1987 and that he had only been with Linda 5 or 6 times in the last 20 years (See Deposition at Page 20) Finally, James Good was not financially dependent on Linda Kannaird and recalled that Linda Kannaird loved her daughter. (See Deposition at Pages 28 and 30)

Donna Cobb's relationship with Linda Kannaird was quite tumultuous at times. For example, Donna Cobb and Linda Kannaird got into a physical altercation which resulted in Linda Kannaird filing a criminal complaint against Donna Cobb. According to Donna Cobb's own admissions, she broke down the kitchen door and attacked her sister by first pulling her hair, which apparently was a wig. When the wig came off of Linda Kannaird's head, Donna Cobb proceeded to slap Linda Kannaird across the face. She then continued to berate Linda Kannaird verbally. The criminal complaint resulted in a guilty verdict and fine being assessed against Donna Cobb. (See Deposition at Page 25) In the eight years prior to Linda Kannaird's death, Donna Cobb was never at her house for dinner or any other reason, including holidays. (See Deposition at Page 30) While Donna Cobb stated that she "met Fout" she admitted that she really did not know him. (See Deposition at Page 44) On the day of Linda's death, Donna Cobb wanted to contact Danny Fout's next of kin, but had no idea what his daughters' names were so she was unable to do so. (See Deposition at Page 37)

Finally, it was Donna Cobb who saw that Eugenia was contacted regarding her mother's death. When asked why she thought Eugenia should know, Donna Cobb responded that Eugenia was Linda's "next of kin." Donna Cobb was not financially dependent on Linda Kannaird at the time of her death.

Denise Harrison, also known as Sissy, seemed to have the closest relationship with Linda Kannaird. Denise apparently spoke with Linda on a regular basis and reportedly worked with her at Tudors several years ago and also helped her clean houses around the local area. Denise did not live with Linda Kannaird and had been in the active work force supporting her and her son since her son was 13 years old.

Denise's son is now 30 years of age. Although Denise proclaims that Linda gave her money on a regular basis, i.e. sometimes as much as \$150.00 per week, there is no evidence that Denise was Linda Kannaird's dependent. To the contrary, at the time of Linda Kannaird's death, Denise lived with her boyfriend of 20 years mother's home and took care of her. She received a rent free place to live, support from her boyfriend and approximately \$800.00 per month in income for caretaking. While Linda Kannaird may have been working "two jobs" at the time of her death, one of those jobs was with SuperAmerica where she made minimum wage working approximately 40 hours per week. With regard to the lack of relationship between Eugenia and Linda, Denise Harrison opined that the "it was because of Stella" -- Eugenia's step mother. According to Denise, Stella would not permit Linda to see or talk with Eugenia. Finally, it is Denise's opinion that her sister, Donna Cobb and her brother, Mike, should not receive any proceeds of the lawsuit. (See Deposition at 138)

Dianna Mae Savilla's relationship with Linda Kannaird was congenial and highlighted by the once to twice a week visits Linda Kannaird made to a night club Dianna owned in Dunbar, West Virginia. However, once the night club closed in 1999, Dianna did not see her sister often. Dianna lived in Putnam County and Linda Kannaird in Sissonville making frequent visits difficult. According to Dianna Savilla, the last time she saw Linda Kannaird prior to her death was some time before Christmas in 1999. (See Deposition at Page 177)

Importantly, Dianna Savilla recalled that when Linda Kannaird and Eugene Summers were married there were no difficulties between Eugenia and Linda Kannaird. In fact, their relationship was described by Dianna as "great". (See Deposition at Page

60) Dianna Savilla blamed Eugene Summers new wife, Stella, for the dissolution of Eugenia and Linda Kannaird's relationship. (See Deposition at Page 64) When Linda Kannaird died, Dianna almost immediately thought of Eugenia and made sure someone called her. Dianna Savilla spoke to Eugenia at the funeral and stated that she "felt sorry for her" because she never got to know Linda Kannaird. (See Deposition at Page 84) At the conclusion of the funeral, Dianna asked Eugenia if Denise Harrison could have the "book that everybody signed." Eugenia agreed and stated that she would just like to make a copy and that she would give the original to Denise. (See Page 83 of Deposition) There were no harsh words or confrontations between Dianna Savilla and Eugenia.

Finally, Dianna Savilla testified that she did not hate Eugenia Moschgat and that Eugenia "should be a part of the lawsuit." She stated unequivocally that Linda deeply loved Eugenia more than anything in the world and that she would do anything in the world for her including seeing that Eugenia received proceeds from the lawsuit. (See Deposition at Pages 130-131)¹

¹ At the time of her death, Linda Kannaird had two life insurance policies. Eugenia Moschgat was the beneficiary of both.

IV. POINTS AND AUTHORITIES RELIED UPON

ONLY EUGENIA MOSCHGAT HAS A CAUSE OF ACTION TO RECOVER FOR HER MOTHER'S DEATH

Petitioner's policy argument is that the brothers and sisters of Linda Kannaird are somehow more deserving of recovering damages than Eugenia Moschgat. Although a reading of the various depositions in this case might or might not lead to such a conclusion, the decision of who is entitled to benefits cannot turn on this issue. West Virginia Code 23-4-2(c) simply does not say that a child may recover unless there is someone more deserving that is not within the class of beneficiaries. It is quite clear that there is no authority for such a result under either the deliberate intent statute or the Wrongful Death Act. Unfortunately, Petitioner's arguments are more related to her view of social policy than to the clear language of the law.

Simply put, interpretation of a statute does not, and cannot, depend on an emotional response to an unusual situation. This is why it is important to apply statutes as written rather than attempting to avoid the proper outcome merely because one does not like the result in a particular case. Here, the deliberate intent statute is so clear as to require no interpretation. Only Eugenia Moschgat may recover damages for the death of her mother in a deliberate intent suit against her mother's employer.

In order to gain control of this litigation, Margaret Workman and the Petitioner have constantly and without merit attacked Eugenia Moschgat. As set forth in the statement of facts Eugenia Moschgat was the innocent victim of a domestic situation which resulted in her mother giving up custody of her. Ms. Moschgat was raised by her father and paternal grandmother and enjoyed regular visitation with her mother until her

father remarried when she was twelve years old. Thereafter, Linda Kannaird moved around and she and her daughter lost contact. Then, upon graduation from high school, joined the United States Army and was almost immediately deployed overseas and spent over six (6) years in Germany serving her Country.

A simple review of the facts reveals that all of Linda Kannaird's relation had varied relationships with her. It is not the Court's obligation or duty to sort out the emotional aspects of every relationship one has with family members prior to their death.

The one salient fact that has arisen out of this sad affair is that Eugenia Moschgat and her mother both wanted to find a way to correct the separation that occurred when Eugenia was a child. However, given a very unfortunate turn of events no such reunion occurred. Regardless, when Eugenia Moschgat learned of her mother's death, she was devastated and immediately returned to West Virginia and assumed all of the responsibilities associated with being a daughter.

After her mother's death she was properly appointed as Administratrix and sought to include Linda Kannaird siblings in a wrongful death lawsuit. While serving as Administratrix of her mother's estate, every sibling of Linda Kannaird's has testified that Eugenia Moschgat had not done anything adverse to their position or interest. Additionally, every sibling has testified that Eugenia did nothing nor said anything negative or hostile to them.

In fact, the only request made by the Kannaird siblings of Ms. Moschgat was that a wrongful death suit be filed on behalf of their deceased sister. Ms. Moschgat filed such wrongful death action on April 11, 2000 and prosecuted it vigorously until July 5,

2000 when the Goods requested and received a Stay of the Proceedings. Curiously, and although it is the Goods who have professed their desire to have their sister's death vindicated via a wrongful death suit, it is the Goods who have continuously stood in the way of the wrongful death action, while pursuing their own interests. Furthermore, the Goods have never complained about any particular actions Ms. Moschgat should have or should not have taken with regard to her prosecution of the wrongful death action.

The question of who may recover damages for Linda Kannaird's death is settled West Virginia case law and is not dependent on an analysis of West Virginia Code 23-4-2. Since West Virginia Code, 23-4-2, names the specific beneficiaries who take, the recovery under its terms would be distributed to "the employee, the widow, widower, child or dependent". See, **Mandolidis v. Elkins Industries, Inc.**, 161 W. Va. 695, 246 S.E.2d 907,911-12 (1978).

Under the Workers' Compensation Act brothers and sisters, unless invalid and dependent, may not recover workers' compensation benefits. Since a deliberate intent action under W. Va. Code 23-4-2 is brought "for any excess of damages over the amount received or receivable under this chapter," it logically follows that individuals who may not receive workers' compensation benefits also may not sue for damages.

Since no dependents were identified in the Complaint or in the discovery herein, the employee is deceased and there is no widower, only the daughter, Eugenia Moschgat is entitled to take. Notably, decedent's daughter, through her independent counsel; has a separate settlement pending with Speedway SuperAmerica.

The West Virginia Supreme Court of Appeals has specifically and unequivocally concluded that the deliberate intent provisions contained in W. Va. Code 23-4-2 are

statutory and have completely replaced the common law right of action. Nothing in the plain language of the Workers' Compensation Act authorizes an Administratrix to prosecute this action on behalf of beneficiaries of an estate. As a statutory cause of action, a deliberate intention lawsuit can only be brought by the classes of persons identified in the Workers' Compensation Act as benefit recipients. As the West Virginia Supreme Court of Appeals has indicated, it is not the role of the Court to rewrite statutory provisions simply because they are not to a court's liking. **Zelenka v. City of Weirton**, 208 W. Va. 243, 539 S.E.2d 750 (2000). A party who is not expressly listed in the deliberate intent statute as being entitled to bring an action against an employer simply has no right to do so.

Nowhere in the deliberate intent statutory scheme is an estate representative authorized to bring an action on behalf of beneficiaries. This is consistent with the purpose of the Workers' Compensation Act, which is to provide benefits for certain limited classes of persons who are, or could be, dependent upon the injured worker. Qualified persons have a direct cause of action under the Act.

As noted above, the West Virginia Supreme Court of Appeals has determined that "the deliberate intention cause of action expressed within W. Va. Code. § 23-4-2(c) (1991) supersedes a common law cause of action against an employer and is woven within the workers' compensation fabric of this State" **Bell v. Vecellio & Grogan Inc.**, 197 WV 138, 475 S.E.2d 138, (1996). The statute specifically states that the "privilege" of bringing such an action belongs solely to the designated classes of persons; in this case, only the child of Linda Kannaird. Just as Eugenia Moschgat is the only person who could recover workers' compensation benefits for the death of Linda Kannaird, she

is the only person with standing to seek to recover damages over the amount received or receivable under the Workers' Compensation Act. Since the legislature chose not to include the estate representative within the categories of persons entitled to bring a deliberate intent action, Savilla's action must fail. To permit Savilla to continue with the deliberate intent action is to ignore the clear, express language of the statute.

Furthermore, even if Petitioner is the proper plaintiff, she may recover only for the benefit of Eugenia Moschgat who has a pending settlement with Speedway SuperAmerica. Under such circumstances, Petitioner has a fiduciary obligation to Eugenia Moschgat which she and her legal counsel have clearly violated. The Court has made it clear that a deliberate intent action is purely a statutory cause of action regardless of the fact that the damages recovered are not workers' compensation benefits. Since the statute grants a cause of action to "the employee, the widow, widower, child or dependent," the only persons in these categories should be plaintiffs. In this action, since the interests of Petitioner and Eugenia Moschgat are clearly adverse, it would be highly inappropriate for Petitioner to continue this action where the only person who may benefit from any award is Eugenia Moschgat, and she has already resolved her claim.

Petitioner contends that there are certain facts that she could have proven that would have entitled her to relief. For example, the Petitioner raises the issue of the alleged dependence of "Sissy" Harrison on decedent. However, here, Petitioner asserts only that Ms. Harrison was partially financially dependent on decedent. Even this is not supported by the record, but it does not matter. Partial dependency is insufficient. In order to be within the class of persons who may recover in an action brought under W.

Va. Code 23-4-2(c), if a person is not an employee, widow, widower or child, he or she must be a dependent. "Dependent" is defined for purposes of Chapter 23, as:

[a] widow, widower, child . . . stepchild . . . father, mother, grandfather or grandmother, who at the time of the injury causing death, is dependent in whole or in part for his or her support upon the earnings of the employee; and invalid brother or sister wholly dependent for his or her support upon the earnings of the employee at the time of the injury causing death.

W. Va. Code 23-4-10(d) (emphasis added).

There is no contention or evidence that "Sissy" Harrison was either an invalid or wholly dependent on decedent. Furthermore, on page 32 of her brief, Petitioner concedes that "Sissy" Harrison was not wholly financially dependent on decedent. Therefore, Ms. Harrison simply does not qualify for a cause of action under W. Va. Code 23-4-2, There is nothing in Ms. Harrison's deposition or any other deposition that remotely suggests total dependency."

Finally, the Petitioner, in violation of her fiduciary responsibility, maliciously attacks the character of Eugenia Moschgat and argues that the "public interest" is at stake in this case. However, and as has been shown in this brief, West Virginia law has long recognized the classes of individuals who may recover under W. Va. Code 23-4-2(b) [now W. Va. Code 23-4-2(c)]. Only one person qualifies for a recovery in this action, Eugenia Moschgat. The public interest is not violated by following settled precedent, even though that precedent benefits some to the exclusion of others. The issue here is clear, and the Court should uphold the dismissal.

CONCLUSION

It is well established that the plain language of W. Va. Code 23-4-2 specifically limits the classes of persons who may bring a deliberate intent action. Under that statute, only an employee, widow, widower, child or dependent may bring a deliberate intention action or recover damages in such an action. In this case, the employee, Linda Kannaird, is deceased. There is no widow or widower as Linda Kannaird was not married at the time of her death. There are no dependents as that term is defined in the Worker's Compensation Act. In this case, then, the only remaining person who may bring a deliberate intent action for the death of Linda Kannaird is her only child, Eugenia Moschgat. As the Circuit Court of Kanawha County recognized in dismissing this action there is simply no room for interpretation. Only Ms. Moschgat has a cause of action, and only Ms. Moschgat may recover damages. The decision of the Circuit Court of Kanawha County should be affirmed.

EUGENIA MOSCHGAT

By Counsel



J. Michael Ranson - W.Va. State Bar ID #3017

Cynthia M. Ranson - W.Va. State Bar ID #4983

Ranson Law Offices

1562 Kanawha Blvd., East

Post Office Box 3589

Charleston, West Virginia 25336-3589

(304)345-1990

Counsel for Intervenor, Eugenia Moschgat


CERTIFICATE OF SERVICE

I, J. Michael Ranson hereby certify that the foregoing **INTERVENOR'S BRIEF IN OPPOSITION TO DIANNA MAE SAVILLA'S APPEAL and MOTION TO ACCEPT BRIEF OF INTERVENOR OUT OF TIME FOR GOOD CAUSE**, has been served upon the following counsel of record this **8th** day of **June 2006**, by depositing a true copy thereof in the United States Mail, postage paid and addressed as follows:

Jeffrey K. Phillips, Esquire
Teresa Lewis, Esquire
STEPTOE & JOHNSON
Post Office Box 1588
Charleston, West Virginia 25326
*Counsel for Defendants, City of Charleston Fire Department,
Bruce Gentry and Rob Warner*

Joseph S. Beeson, Esquire
ROBINSON & McELWEE, L.L.P.
Post Office Box 1791
Charleston, West Virginia 25326
*Counsel for Defendant, Speedway SuperAmerica,
LLC d/b/a Rich Oil Company*

Margaret L. Workman, Esquire
1596 Kanawha Blvd. East
Charleston, WV 25311


Cynthia M. Ranson